

Friday, 8 November 1946

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

On paper No. 513 - Application of prosecution for leave to employ AKIRA TORISAWA, IMTFE Translator and Interpreter, to assist in translations for the prosecution.

On paper No. 539 - Application of the Accused ARAKI by Counsel, relative to the status of the prosecution regarding witnesses to be produced on behalf of the defense under the Charter.

Before:

HON. SIR WILLIAM WEBB,
President of the Tribunal and
Member from the Commonwealth
of Australia.

Reported by:

Julian Wolf
Official Court Reporter
IMTFE

Appearances:

For the Prosecution Section:

MR. W. G. F. BORGERHOFF MULDER, Justice,
Associate Counsel, acting on be-
half of the Kingdom of the Netherlands
MR. SOLIS HORWITZ

For the Defense Section:

MR. LAWRENCE P. McMANUS, Counsel for the
Accused ARAKI, Sadao
MR. OWEN CUNNINGHAM, Counsel for the
Accused OSHIMA, Hiroshi
MR. MICHAEL LEVIN, Counsel for the
Accused SUZUKI, Teiichi

For the Office of the General Secretary, IMTFF

MR. C. A. MANTZ, Clerk of the Court
MR. H. W. DELANEY, Deputy Clerk of
the Court

The proceeding was begun at 0900.

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THE PRESIDENT: This is an application for leave -- an application by the prosecution -- for leave to employ Akira Torisawa, the Tribunal's translator and interpreter to assist the associate prosecutor for the Netherlands.

Who is appearing on this application?

MR. HORWITZ: I am appearing here, your Honor. General Mulder is not here right now, but the problem is this: In order to get the documents translated from Dutch to Japanese, which is one step, they have to have some one who knows both of those languages. The number of people in Japan who know them both are extremely limited. We have known of one, but he cannot do that work all by himself. This other gentleman, employed by the Tribunal, is the other one available in Tokyo, who can do that work and his work on that -- of translating these documents -- will be completed before that phase of the case goes on and get that direct translation from Dutch to Japanese.

General Mulder is here now.

THE PRESIDENT: Yes. General, I am just dealing with your application; I suppose it is yours, to employ Torisawa?

MR. JUSTICE BORGERHOFF MULDER: Yes, sir.

THE PRESIDENT: He is now employed by the Tribunal?

MR. JUSTICE BORGERHOFF MULDER: Yes, sir, he is. We need him as an interpreter. He is the sort of person --

THE PRESIDENT: And he is invited to assist the prosecution; that is what it amounts to. I am not inclined to favor this application. I do not think the Tribunal staff should take part in the preparation of the prosecution's case.

MR. HORWITZ: I do not think that has anything to do with the preparation, your Honor. That is using a particular skill to translate. Now, we either have to do it that way or have the translation done in open court by him looking at it, examining it then and doing it. He would have to do it before or else do it in open court from the Dutch. If you have no translator who can translate from Dutch to Japanese there is only one way to do it then. If there is one in open court that would have to be done then.

THE PRESIDENT: Will some of the witnesses speak in Dutch?

MR. JUSTICE BORGERHOFF MULDER: Yes, sir.

THE PRESIDENT: Is it in connection with the

taking of evidence that you require this assistance?

MR. JUSTICE BORGERHOFF MULDER: Yes.

THE PRESIDENT: And there is no doubt about the charter permitting witnesses to speak in their own language. I do not think any Member of the Court can test that; otherwise it would restrict the amount of evidence that might be given by one side or the other. The most vital witness might not speak either English or Japanese.

You say the position is this: That unless this interpreter assistant is made available to the prosecution we would have to fall back on his services in court --

MR. HORWITZ: That is right.

THE PRESIDENT: (Continuing) as our officer when these Dutch witnesses are called.

MR. HORWITZ: With this alternative: That his services to us may well show that he may not be needed as a witness, whereas, the other way, we may have to bring him in for the first time in open court to find out he is needed as a witness.

THE PRESIDENT: Yes. He would not be receiving any remuneration from the prosecution?

MR. HORWITZ: Not that I know of.

THE PRESIDENT: He will be under no obligation

to them?

MR. JUSTICE BORGERHOFF MULDER: No, sir.

THE PRESIDENT: His independence will be preserved as an official of the Tribunal?

MR. JUSTICE BORGERHOFF MULDER: Yes, he is the only one we intend to use.

THE PRESIDENT: You say if his assistance is given to you, General, you will be able to save time for the Court; is that what it amounts to?

MR. JUSTICE BORGERHOFF MULDER: Yes, sir.

THE PRESIDENT: Or you may be able to do so. The application is granted.

The next application is a request for an order of the Court by the accused, ARAKI, that the prosecution be prohibited from interviewing, questioning or otherwise approaching any of this particular accused's witnesses prior to the Trial.

MR. HORWITZ: Well, this application, your Honor, has not been served as yet, but when the matter does come up for a hearing, I believe it is going to be very strongly opposed.

THE PRESIDENT: Do you want to be heard on this?

MR. HORWITZ: Very definitely, sir.

Our position is this: We are very much opposed

to this proposition.

THE PRESIDENT: Rightly or wrongly, I take the view that if a witness is under subpoena, or you knew he was going to be called by the defense, you would not be justified in approaching him.

MR. HORWITZ: I am not so sure, your Honor, that that is the law as followed in most of the Courts.

THE PRESIDENT: If you want to be heard, and that was my impression, certainly you would not have come to any conclusion at this hearing.

MR. HORWITZ: We wish to be heard in this matter and prepare a statement on him.

THE PRESIDENT: It would be brought up on the application for the witnesses. Still, you have an application now dealing with this position.

MR. HORWITZ: Yes.

MR. McMANUS: If your Honor please, in the meantime, if this is going to be put over to any other date, I request the Court instruct the prosecutors that the contents of this affidavit be carried out until such time as the matter is heard. I mean, that the witnesses shall not be approached, or interviewed or interrogated until the time that the matter is heard.

THE PRESIDENT: A sort of interim injunction.

MR. McMANUS: Yes.

THE PRESIDENT: Are there any here now that the prosecution are likely to approach?

MR. HORWITZ: I do not know of any one on the list that they are likely to approach at this time, but even an interim injunction is one that should not be granted in this type of case.

I think that we may state our views a little bit to your Honor in advance, that one; we believe there is no such thing as a prosecution or a defense witness. A witness is a Court witness. A witness is to give the Court the facts, and what the Court is interested in is getting facts and getting the knowledge of what the witness knows.

THE PRESIDENT: On it, of course, the Charter says otherwise. It speaks of the witnesses for the prosecution and the defense. It does not talk of other witnesses.

MR. HORWITZ: It hears of witnesses produced by them, but a witness in court becomes a Court's witness. The witness is always there. I am not going into another point of binding by testimony. I wish -- I do not think that enters this picture.

THE PRESIDENT: I can easily see that in extreme cases the prosecution would be prevented

altogether from interviewing witnesses if the defense, say, subpoenaed every possible person.

MR. HORWITZ: Well, that is the point I wish to bring up. We have a duty over and above this particular case of investigating all "class A" crimes. We have a duty, and it is a duty being carried out, of investigating "class A" crimes for further trials. Now, there are two things; one is the right and the second thing is the ability to even enforce this order which always enters into an injunction. There are many problems that are going to enter into that, if it is granted, for this Court. First of all, suppose there are twenty-six other defendants -- ARAKI has asked for these twenty-seven odd defendants -- now, suppose we wish to see these witnesses in connection, not with ARAKI, but with other defendants, are we to be barred from that, and if not, is the Court going to enter into extended hearings to show to what extent the prosecution is going to prevent that? In the second place they are not accused in this case.

THE PRESIDENT: Put it this way: You and the defense may require the same witness. The defense subpoena him first; that should not prevent you from subpoenaing that witness also.

MR. HORWITZ: This is not a question of

subpoening a witness for evidence. As a matter of fact, these twenty-seven witnesses have been subpoenaed for the purpose of finding out whether they will be witnesses. It is a question of taking evidence in the first instance.

THE PRESIDENT: The defense can stop you from putting a case at all if they subpoenaed any possible witnesses that you might have. That case does not arise, does it?

MR. HORWITZ: That is exactly it. I say that that case can arise and since this is based and must be based only on a belief that there be bad faith exercised by the prosecution, the prosecution in turn must take the position that bad faith might be exercised on the other side and might put in a blanket subpoena completely preventing the prosecution from carrying on its duties. We have got to consider that angle and that is the basis of the petition. I know of no instance where neither side is prevented in a case from getting a witness unless it is alleged, a most important allegation, that the witness has been intimidated from giving evidence.

THE PRESIDENT: What I had in mind was this, and I thought the defense did: Is a case where you have not called a person to give evidence, but where they

have decided to do it, would it be right for you to approach that person? It would happen that is the kind of case I had in mind.

MR. HORWITZ: We do not know --

THE PRESIDENT: I am assuming you are not going to call people who already appeared.

MR. HORWITZ: No, but we have other witnesses who have been brought into court, or who will be brought into court, who we have interviewed or are in the process of interviewing. Are we to be stopped from interviewing them?

THE PRESIDENT: They would prevent you from putting a case at all, but I do not think that is the sort of thing they had in mind.

MR. HORWITZ: I think that is what it comes down to, sir.

THE PRESIDENT: I do not take that view. However, we will hear later about that.

You want to be served with a copy of this application and I will fix the date for the hearing.

MR. McMANUS: In the meantime if your Honor decided to grant that sort of interlocutory decree -- I mean --

THE PRESIDENT: I will not do that, Mr. McManus, because I might hang up the Trial.

MR. McMANUS: I beg your pardon.

THE PRESIDENT: They may contemplate calling some of these people you have in mind. If I prevented them from calling them I would hang up the Trial. I am not prepared to do that.

MR. McMANUS: If your Honor please, this is a long week-end and I have submitted my twenty-seven witnesses as far as the order goes and the Charter goes. I am sure, if your Honor please, if any of these witnesses are approached I certainly cannot possibly get the truth out of them again.

THE PRESIDENT: Will you require them before Monday?

MR. HORWITZ: We are not going to bother with them before Tuesday. The next hearing is the twelfth; is it not?

THE PRESIDENT: Yes, next week.

Will you give an understanding not to interview them before the applications are presented?

MR. HORWITZ: Yes, I will give that understanding.

THE PRESIDENT: Very well.

(Whereupon, at 0909, the proceeding was concluded.)

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